

ARTICLES

ENUMERATION AND OTHER CONSTITUTIONAL STRATEGIES FOR PROTECTING RIGHTS: THE VIEW FROM 1787/1791

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Constitutional designers employ many strategies for securing what they believe are fundamental rights and vital interests.¹ Specifying in the constitutional text the rights and interests to be protected is a common device. In a constitution that relies solely on enumeration as a rights-protective strategy, whether that constitution protects abortion rights depends on whether any provision in that constitution is best interpreted as granting women a right to terminate their pregnancies. Enumerating the powers government officials may exercise is a second rights-protective strategy. Government may not constitutionally ban partial-birth abortions, although no constitutional provision properly interpreted protects a right to reproductive choice, when no constitutional provision properly interpreted authorizes government officials to interfere with reproductive decisions. Structuring government institutions is a third rights-protective strategy, one that does not rely primarily on enumeration or interpretation. Government officials do not ban abortion, even when at least some reasonable persons believe constitutional provisions are best interpreted as permitting legislative prohibitions, when the constitutional rules for staffing the government and passing laws consistently provide pro-choice advocates with the power necessary to prevent hostile proposals from becoming law. Equal protection is a fourth strategy for protecting fundamental rights. Elected officials are less inclined to ban abortion when they may not constitutionally confine that prohibition to certain social classes or racial groups.

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¹ See generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006) (arguing that constitutions may be designed to secure immoral privileges such as slavery as well as moral privileges such as human rights).

Contemporary American constitutionalists typically treat enumeration as the primary, often only, constitutional strategy for protecting fundamental rights. The common terminological distinction between "enumerated" and "unenumerated" rights implies that rights not enumerated in the constitutional text are best characterized by virtue of what they are not, rather than as linked to alternative constitutional strategies for securing fundamental freedoms. Constitutional debate during the 1970s and 1980s was over whether Justices ought to extend the same degree of protection they offered to the liberties enumerated in the Bill of Rights and post-Civil War Amendments to other fundamental freedoms not explicitly mentioned in those texts or in other constitutional provisions. "[T]he most fundamental question we can ask about our fundamental law," Thomas Grey declared in 1975, is whether when

reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution . . . [o]r may they also enforce principles of liberty and Justice when the normative content of those principles is not to be found within the four corners of our founding document?²

Enumeration presently reigns supreme in the American constitutional universe. Leading progressive constitutional theorists at the turn of the twenty-first century insist that rights formerly thought unenumerated are actually enumerated. "The distinction . . . between enumerated and unenumerated rights," Ronald Dworkin declares when defending judicial solicitude for legal abortion, is "another misunderstood semantic device."³ Dworkin and other prominent proponents of *Roe v. Wade*⁴ maintain that Justices must strike down bans on abortion only because reproductive rights are explicitly protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, properly interpreted.⁵ Grey, who helped coin the term "non-interpretivism," agrees with this emphasis on enumeration as the foundation of constitutional rights. He now believes "[i]t is better to treat all approaches to constitutional adjudication as con-

² Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).

³ Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, in THE BILL OF RIGHTS IN THE MODERN STATE 381, 386 (Geoffrey R. Stone et al. eds., 1992).

⁴ 410 U.S. 113 (1973).

⁵ See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 160 (Alfred A. Knopf, Inc. 1993) ("The general structure of the Bill of Rights is such that any moral right as fundamental as the right of procreative autonomy is very likely to have a safe home in its text."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382-86 (1985) (suggesting that abortion decisions are better grounded in equal protection than due process).

strained to the interpretation of the sources of constitutional law, and then to argue about what those sources are and how much relative weight they should have.”⁶

Constitutional analysis that privileges enumeration as the primary constitutional strategy for protecting fundamental freedoms interprets the Constitution of 1787 in light of the Constitution of 1791.⁷ The original Constitution, commentary that celebrates the Bill of Rights proclaims, was largely limited to delineating the structure and powers of the national government. That Constitution sought to create institutions that would protect against foreign aggression, suppress internal rebellions, and regulate the national economy, but omitted vital protections against abusive official behavior. The first ten Amendments to the Constitution, on this account, guarantee that the national government will respect certain fundamental freedoms when securing the above constitutional ends. Contemporary pedagogy entrenches this distinction between the original and amended constitutions by dividing the constitutional universe into a course on the structure of government, which focuses exclusively on the proper interpretation of constitutional provisions drafted in 1787, and a course on civil rights and liberties, which focuses exclusively on the proper interpretation of Amendments ratified in 1791, 1865, and 1868.⁸

This sharp separation between constitutional questions associated with the structure of government and constitutional questions associated with fundamental freedoms distorts constitutional history and practice. The Framers of the original Constitution failed to specify what rights the Constitution protected because they did not believe enumeration was an effective strategy for securing fundamental freedoms. Vested property rights and the freedom of speech, in their view, were better protected by well-designed governing institutions than by paper guarantees. The more fundamental the right, the less likely that right was enumerated in 1787. *The Federalist No. 10* highlights “the rights of property” and worries that a “religious sect may degenerate into a political faction.”⁹ Nevertheless, the original Constitution provides no explicit textual protections for economic liberty

⁶ Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211, 220 (1988).

⁷ Similarly, Section 5 of the Fourteenth Amendment is interpreted in light of Section 1.

⁸ See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (Found. Press, 15th ed. 2004) (relying on a sharp separation between cases dealing with the structure of government and cases dealing with individual rights).

⁹ THE FEDERALIST NO. 10, at 81, 84 (James Madison) (Clinton Rossiter ed., 1961).

or for the freedom of conscience. Madison instead insisted that the constitutional politics of the large republic would more securely guarantee these rights than a pious textualism.¹⁰ Framers who did not fully grasp Madison's analysis in *The Federalist No. 10*¹¹ nevertheless endorsed Madison's more general commitment to institutional design as the best strategy for preventing tyranny.¹²

This paper interprets the Constitution of 1791 in light of the Constitution of 1787.¹³ The persons responsible for the original Constitution thought they had secured fundamental rights by a combination of representation, the separation of powers, and the extended republic. The Bill of Rights, in their view, was a minor supplement to the strategies previously employed for preventing abusive government practices. Madison in 1789 did suggest that enumeration might provide some additional security for the freedom of speech and related concerns. Nevertheless, his proposed amendments were less a list of fundamental freedoms than an enumeration of those rights likely to appease moderate Anti-federalists. That many vaguely phrased rights lacked clear legal meaning was of little concern to their Federalist sponsors, who trusted their cherished governing institutions to resolve ambiguities justly when controversies arose in the future. Madison and his political allies refused to accommodate their political rivals only when former Anti-federalists proposed enumerating a right to instruct representatives, a right Madison thought destructive of the constitutional politics he believed best secured fundamental freedoms.

Contemporary debates over whether the United States has an unwritten constitution and over whether the judiciary (or any other institution) should protect unenumerated constitutional rights are rooted in the ways the Framers from 1787 to 1791 juxtaposed different strategies for protecting fundamental freedoms. The Bill of Rights did not include a caveat stating that those amendments were a "sop" to the Anti-federalists,¹⁴ a minor supplement to more important institutional protections for fundamental rights, or a somewhat random collection of liberties spelled out for the sole benefit of persons

¹⁰ *Id.*

¹¹ Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 615 (1999).

¹² See *infra* notes 21–23 and accompanying text.

¹³ A future project may interpret Section 1 of the Fourteenth Amendment in light of Section 5.

¹⁴ But see CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 9 (2005) (claiming that the Bill of Rights was a "sop" to the Anti-federalists).

unaware of how constitutions best protected rights. Persons reading the constitutional text after 1791 might well conclude that those rights enumerated were more central to the constitutional order than those omitted. *Marbury v. Madison*,¹⁵ or rather the nineteenth-century political movements that successfully reinvigorated the logic of *Marbury*, further promoted enumeration and judicial power as the only means for limiting republican government. If, as Madison claimed in 1789, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights,"¹⁶ and, as a later Supreme Court Justice asserted, "the Constitution is what the judges say it is,"¹⁷ then the conclusion might follow that the Constitution protected only those rights enumerated in the text, rights best protected by the federal judiciary. Such claims were made, however, only after Americans forgot the constitutional strategies for protecting fundamental rights adopted in 1787, and transformed the partisan strategy adopted in 1789 for appeasing political opponents into the best constitutional strategy for securing vital freedoms in the present.

I. THE VIEW FROM 1787

Conventional accounts of American constitutional development regard the Bill of Rights as correcting a defective Constitution. Citizens are commonly taught that the persons who drafted the original Constitution forgot to include textual protections for fundamental rights in their effort to secure the blessings of liberty. Exhausted by months of "writ[ing] and rewrit[ing] sections" on "the frame of government," fatigued by the summer heat, and eager to return home, the Framers' "impatience outweighed their judgment"¹⁸ when every state delegation rejected George Mason's proposal that the Constitution be "prefaced with a Bill of Rights."¹⁹ Subsequent rationalizations that a bill of rights was not necessary in a government of enumerated powers²⁰ were clearly inadequate. As numerous Anti-federalists

¹⁵ 5 U.S. (1 Cranch) 137 (1803).

¹⁶ 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1834).

¹⁷ 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 204 (Macmillan Co. 1951).

¹⁸ Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 305, 305 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

¹⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., Yale Univ. Press 1966) [hereinafter RECORDS].

²⁰ See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 167–68 (Merrill Jensen ed., State Historical Soc. of Wis. 1976) [hereinafter DOCUMENTARY HISTORY] ("[T]he

pointed out, the powers enumerated in Article I could easily be interpreted as granting the federal government unlimited authority. "The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution," Brutus complained, "leaves the legislature at liberty, to do every thing, which in their judgment is best."²¹ The Bill of Rights supposedly cured the original Constitution's failure to provide adequate textual protections for basic rights by providing legal guarantees that national officials could not violate fundamental freedoms when pursuing legitimate constitutional ends.

The better view is that the Framers in 1787 were committed to protecting fundamental freedoms, but did not believe enumeration was the best constitutional strategy for securing cherished individual rights. Identifying tyranny with class or partial legislation,²² Federalists designed governing institutions they believed would enable the best men to gain public office and provide those distinguished representatives with incentives to secure the public welfare. Madison and his political allies were convinced that government abuses and majority tyranny would most likely be prevented by processes for staffing the government that privileged the selection of particularly wise and virtuous candidates, and by processes for making laws that privileged policies aimed at the common good rather than the benefit of particular classes or individuals. The large republic, *The Federalist No. 10* proclaimed, would yield a leadership class "whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."²³ *The Federalist No. 51* explained why the constitutional separation of powers would enable "the private interest of every individual" to be "a sentinel over the public rights."²⁴ Structural considerations trumped parchment barriers in 1787. If governing institutions were designed correctly, the Framers believed, enumerating

congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident . . . everything which is not given, is reserved . . .").

²¹ *Essays of Brutus*, in 2 THE COMPLETE ANTI-FEDERALIST 421 (Herbert J. Storing ed., Univ. of Chic. Press 1981).

²² See HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER-Era POLICE POWERS JURISPRUDENCE 27 (1993) ("[M]any at the time of the founding considered the exercise of public power illegitimate precisely to the extent that it was designed merely to advance the special interests of particular classes . . .").

²³ THE FEDERALIST NO. 10 (James Madison), *supra* note 9, at 82.

²⁴ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 322.

individual rights was unnecessary. If governing institutions were designed poorly, enumerating individual rights was useless.

A. *Protecting Rights in 1787*²⁵

The persons responsible for drafting the Constitution of 1787 were far more concerned with constitutional politics than constitutional law. They sought government institutions that privileged certain outcomes and were less interested in formulating textual definitions of government powers and individual rights. Madison famously proposed “republican remed[ies] for the diseases most incident to republican government.”²⁶ The original Constitution did not include a bill of rights because Madison and other prominent Framers doubted the efficacy of legal limitations on government power. On matters as diverse as religious freedom and slavery, the Framers consistently sought to establish a political process that would secure certain fundamental rights and interests, scorning the enumeration strategy they would later adopt in 1791.

Federalists in 1787 regarded legal restrictions on federal power as dangerous, inappropriate and useless. In their view, “a written declaration of rights” was “unnecessary in theory and ineffectual in practice.”²⁷ Madison thought the adoption of a federal bill of rights was “an irrelevant antidote to the real dangers that republican politics would generate.”²⁸ Government officials committed to the public good sometimes faced irresistible pressures to ignore textual limits on their powers. “It is in vain,” *The Federalist No. 41* asserted, “to oppose constitutional barriers to the impulse of self-preservation.”²⁹ Past experience demonstrated that clear constitutional guidelines did not restrain officials bent on unconstitutional usurpations. Roger Sherman informed New Englanders that “[n]o bill of rights ever yet bound the supreme power longer than the *honeymoon* of a new mar-

²⁵ Most of this section is a lightly edited version of MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 96–100 (2006).

²⁶ THE FEDERALIST NO. 10 (James Madison), *supra* note 9, at 84.

²⁷ FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787–1788, at 161 (Colleen A. Sheehan & Gary L. McDowell ed., 1998) [hereinafter FRIENDS OF THE CONSTITUTION].

²⁸ JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 334 (Alfred A. Knopf, Inc. 1996).

²⁹ THE FEDERALIST NO. 41 (James Madison), *supra* note 9, at 257; *see* THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 9, at 160, 167 (“[H]ow unequal parchment provisions are to a struggle with necessity.”).

ried couple, unless the *rulers were interested* in preserving the rights.”³⁰ *The Federalist No. 48* commented, “a mere demarcation on parchment of the constitutional departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hand.”³¹ Rights could not be defined in ways that adequately identified government oppression. “What signifies a declaration that ‘the liberty of the press shall be inviolably preserved?’” Hamilton asked.³² “What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?”³³ Parchment declarations could also be rescinded. “Neither would a general declaration of rights be any security,” Civic Rusticus wrote, “for the sovereign who made it could repeal it.”³⁴

Individual rights were best protected by well-designed institutions. “(A)ll observations founded upon the danger of usurpation,” Hamilton wrote, “ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”³⁵ Prominent proponents of ratification declared that the national government could be vested with substantial powers because the internal structure of that regime guaranteed that such authority would not be abused. “[T]he delegating of power to a government in which the people have so many checks,” James Bowdoin Dalton asserted, “will be perfectly safe, and consistent with the preservation of their liberties.”³⁶ When Madison at the drafting convention emphasized the need to “introduce the Checks . . . for the safety of a minority in Dan-

³⁰ 3 DOCUMENTARY HISTORY, *supra* note 20, at 472; *see* 8 *id.* at 308, 438 (stating that those who are in power can usurp authority under any constitution, regardless of the presence of a bill of rights, which will only inform of rights, not restrain against tyranny); 9 *id.* at 975 (arguing that bills of rights have never secured against danger, but have been “disregarded and violated”); 10 *id.* at 1333–34 (asserting that a bill of rights alone, without support from the governing body, will not automatically ensure the principles it demands).

³¹ THE FEDERALIST NO. 48 (James Madison), *supra* note 9, at 313; *see* THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 9, at 442 (noting “[t]he insufficiency of a mere parchment delineation of the boundaries of each” branch of the national government).

³² THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 514.

³³ *Id.*

³⁴ 8 DOCUMENTARY HISTORY, *supra* note 20, at 334; *see id.* at 337 (“[O]ur Bill of Rights *may* be repealed.”).

³⁵ THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 9 at 196; *see* THE FEDERALIST NO. 41 (James Madison), *supra* note 9, at 256 (“[I]n all cases where power is to be conferred, the point first to be decided is whether such a power be necessary . . . as the next will be . . . to guard as effectually as possible against a perversion of the power . . .”).

³⁶ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 105 (Jonathan Elliot ed., 1836) [hereinafter DEBATES]; *see* 9 DOCUMENTARY HISTORY, *supra* note 20, at 987–88 (avowing that political happiness rests with the republican government).

ger of oppression from an unjust and interested majority," he proposed such procedures as a national veto on state legislation rather than specific limits on government power.³⁷ Hamilton regarded "[t]he Constitution" as "A BILL OF RIGHTS" in part because it "specif[ied] the political privileges of the citizens in the structure and administration of the government."³⁸

Basic republican institutions provided the most important structural protection against tyranny. Officials "dependent on the Suffrage of the people for their appointment to, and continuance in office," were thought "a much greater Security than a declaration of rights, or restraining clauses upon paper."³⁹ The "security" for rights, Hamilton bluntly stated, "whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."⁴⁰ Benjamin Rush informed Pennsylvanians that "there is no security but in a pure and adequate representation."⁴¹ George Mason agreed that the democratic principle is the only means of securing the rights of the people.⁴²

When considering the processes for staffing the national government and making laws, the Framers consistently selected those republican practices they believed would best protect fundamental freedoms. The Constitution established relatively large election districts and relatively long terms of office because the Framers thought these practices would "obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society."⁴³ The Senate was similarly structured to privilege the selection of "men of integrity and abilities."⁴⁴ Such persons, because of their superior political fiber, would tend to exercise power prudently, protect fundamental freedoms, respect constitutional compromises, and gener-

³⁷ 1 RECORDS, *supra* note 19, at 108.

³⁸ THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 515; see Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 66 (noting the Framers' recognition that "the most efficient way to limit power was not to withhold powers . . . but to organize power in a particular way").

³⁹ 14 DOCUMENTARY HISTORY, *supra* note 20, at 387.

⁴⁰ THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 9, at 514.

⁴¹ 2 DOCUMENTARY HISTORY, *supra* note 20, at 433.

⁴² 1 RECORDS, *supra* note 19, at 359.

⁴³ THE FEDERALIST NO. 57 (James Madison), *supra* note 9, at 350; see Mark A. Graber, *Conflict-ing Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENT. 291, 299-304 (1996) (explaining that lengthy terms of office allowed officials to withstand political pressures while making informed and reasoned decisions).

⁴⁴ Essay, *A Federalist*, INDEP. GAZETTEER (Philadelphia), Oct. 25, 1787, *reprinted in* FRIENDS OF THE CONSTITUTION, *supra* note 27, at 41.

ally adhere to the spirit of the Constitution. Madison thought religious freedom would be protected primarily by electoral arrangements that ensured the diversity necessary to prevent any sect or combination of sects from establishing the control over the national legislature necessary to oppress rival sects. He famously declared:

In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principle than those of justice and the general good⁴⁵

The constitutional provisions crafted in 1787 are better conceptualized as guidelines for elected officials than as poorly drafted or intentionally vague legal rules to be enforced by the federal judiciary. The Constitution of 1787 does contain some legal rules. The American Constitution requires congressional elections to be held every two years and insists that war be declared only by the national legislature. These rules, however, are not the most important source of limits on government powers. Rather than specify fundamental freedoms and vital interests in advance and for all time, the Framers designed institutions that let states, government officers, various religious sects, and other entities at any given time determine and protect their rights. Whether governing institutions are functioning as originally designed depends on the extent to which the officers making decisions have the requisite abilities and interests, not on the precise decisions they make. Herbert Storing's influential analysis of framing thought aptly concluded that "the substance [of the Constitution] is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue," he emphasized, "that the security of American civil and political liberties lie."⁴⁶

B. *The Rights Protected in 1787*

Institutional strategies for protecting natural and civic rights were particularly appropriate given the nature of the liberties Americans sought to secure in 1787. Constitutional institutions were expected to secure fundamental rights, and not simply those rights thought to

⁴⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 9, at 325.

⁴⁶ Herbert J. Storing, *The Constitution and the Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 35 (Robert A. Goldwin & William A. Schambra eds., 1985); see Walter Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS?, *supra*, at 50, 51, 59–65 (explaining that limits on government power are found in constitutional majorities, single-issue politics, diversity of interests and industrialization, among other sources).

be fundamental during the late-eighteenth century. Many fundamental rights were conceptualized as rights against partial or class legislation, laws intended to benefit or enrich some persons at the expense of others. The Framers thought official measures aimed at the common good did not violate liberty, no matter what the constraint on individual action. Governing officials were even authorized to waive the rights of their constituents when doing so was clearly in the public interest. Characterizing rights in this way, the persons responsible for the Constitution sought to craft rules for staffing the national government and making national laws that would motivate voters and governing officials to pursue the general welfare. They rejected fixed legal limitations on government power that might in the future prove inconsistent with the common good.

The Framers recognized that enumeration was a poor vehicle for securing the full panoply of fundamental rights. Listing the freedoms considered fundamental in 1787 was impossible. “[A]n enumeration which is not complete is not safe,” James Madison informed the Virginia Ratification Convention, and “[s]uch an enumeration could not be made, within any compass of time.”⁴⁷ James Iredell asserted that it would be

dangerous to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in this exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.⁴⁸

Present enumerations risked disparaging rights recognized by future generations.⁴⁹ The Framers believed that their descendants might better understand fundamental freedoms than they. “[T]he law of nature,” James Wilson declared, “though immutable in its principles, will be progressive in its operations and effects.”⁵⁰ In his view, “the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree but will be calculated to produce, in future, a still higher degree of perfection.”⁵¹ Federalists worried that textual guarantees for presently acknowledged liberties might

⁴⁷ 3 DEBATES, *supra* note 36, at 626.

⁴⁸ 4 *id.* at 167.

⁴⁹ The rest of this paragraph relies heavily on Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1162–64 (1987).

⁵⁰ 1 THE WORKS OF JAMES WILSON 127 (James DeWitt Andrews ed., Callaghan & Co. 1896).

⁵¹ *Id.*

inhibit protection for liberties acknowledged in the future. Edmund Pendleton thought proposed bills of rights failed to anticipate that "in the progress of things, [we may] discover some great and Important [right], which we don't now think of."⁵²

Well-designed governing institutions were better means for protecting all the fundamental rights Americans recognized in 1787 and might recognize in the future. When the federal government was functioning as the Framers expected, governing officials would not violate whatever fundamental rights most Americans believed they enjoyed because all governing officials were elected by the people or appointed by officials elected by the people. "Frequent elections of the representatives of the people," John Dickinson stated, "are the sovereign remedy of all grievances in a free government."⁵³ These governing officials were likely to make wise decisions when future disputes over fundamental rights arose because they were selected by a process thought to guarantee as distinguished a class of governing officials as "republicanly" possible.⁵⁴ When discussing the Senate, Madison insisted that "[t]he danger in all cases of interested coalitions to oppress the minority" would "be guarded against," suggesting that the answer lay with "the establishment of a body in the Govt. sufficiently respectable for its wisdom & virtue, to aid on such emergencies, the preponderance of justice by throwing its weight into that scale."⁵⁵ As Americans gained greater knowledge of their fundamental rights, prominent Framers were confident that institutions staffed by virtuous governing officials could be trusted to respect those newly acknowledged liberties.

Many fundamental liberties the Framers sought to protect were rights against legislation directed at particular persons or classes. Antebellum Americans did not regard laws aimed at safeguarding the public welfare, health, safety, or morals as violating fundamental rights.⁵⁶ In their view, government officials did not limit liberty when they forbade actions thought to threaten harm to others or self. The

⁵² 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON: 1734-1803, at 533 (David John Mays ed., Univ. Press of Va. 1967); see Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 1006-07 (1992) (suggesting that the Framers believed there were rights unknown at ratification).

⁵³ John Dickinson, *Fabius*, in FRIENDS OF THE CONSTITUTION, *supra* note 27, at 57, 62.

⁵⁴ See *supra* notes 43-46 and accompanying text.

⁵⁵ 1 RECORDS, *supra* note 19, at 423.

⁵⁶ See Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 624 (1994) (explaining that nineteenth- and early-twentieth-century judges allowed interferences with individual liberty that they believed would advance the general well-being).

emphasis was on legislative ends, not on legislative means. As Howard Gillman perceptively notes, pre-New Deal “jurisprudence . . . focused on the *character of the legislation* rather than the *importance of the restricted liberty*.”⁵⁷ Justice Stephen Field articulated this consensual view when asserting that “[c]lass legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [Fourteenth] Amendment.”⁵⁸ The Supreme Court in *Lochner v. New York*⁵⁹ articulated this consensus when holding that states could not restrict the hours that bakers worked. Such measures benefited employees at the expense of employers and “involve[d] neither the safety, the morals nor the welfare of the public.”⁶⁰ Antebellum Americans similarly yoked the freedom to possess and carry weapons to the public good. As originally understood, the Second Amendment protected “a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”⁶¹ Such a conception of liberty, Saul Cornell documents, was quite consistent with any “intrusive gun regulation” thought necessary to serve the commonwealth.⁶² Committed to this distinction between public and private purposes, Americans before the New Deal regarded laws transferring property from one person to another as the paradigmatic violation of a fundamental right,⁶³ but thought government could take property from anyone for public purposes as long as compensation was paid.⁶⁴ Common law in the nineteenth century permitted state officials to destroy the value of private property without

⁵⁷ Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 115 (2006). See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER-ERA POLICE POWERS JURISPRUDENCE* (Duke Univ. Press 1993), for the seminal analysis of class legislation in pre-New Deal American constitutionalism.

⁵⁸ *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

⁵⁹ 198 U.S. 45 (1905).

⁶⁰ *Id.* at 57.

⁶¹ SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 2–3 (2006).

⁶² *Id.*

⁶³ John V. Orth, *Taking from A and Giving to B*, 14 CONST. COMMENT. 337, 341–44 (1997) (relying on the *Calder v. Bull* opinion for a natural law justification of property rights).

⁶⁴ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005) (“[A] State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking . . .”).

compensation when that property in its natural state or as used was causing harm to others.⁶⁵

Well-designed governing institutions best secured this fundamental right not to be a victim of private or class legislation. What was crucial, Federalists insisted, was that government pursue the common good, not that government pursue the common good by means that did not interfere with individual autonomy. The eighteenth-century Constitution protected this notion of fundamental rights by establishing government arrangements thought to provide citizens and elected officials with incentives to promote the general welfare.⁶⁶ The Framers believed the combination of elections, large electoral districts, and the separation of powers would maximize the probability that all legislation had a public purpose. *The Federalist No. 10* declared that by “extend[ing] the sphere” of constitutional politics, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”⁶⁷ “[T]he genius of the whole system,” *The Federalist No. 57* maintained, was that governing officials could “make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society.”⁶⁸ If this analysis was correct, then a bill of rights was not necessary. Government officials could benefit themselves and their friends only by pursuing the general welfare. Should malfunctioning constitutional institutions enable governing officials to enrich themselves at the expense of others, prohibitions on paper would not provide an adequate deterrent. The Framers saw “history” as “prov[ing] that no formal constraints on authority or process could contain indefinitely the power of a political leader who did not depend on other political actors.”⁶⁹ “The sole question,” Sherman in-

⁶⁵ See *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (holding the builder of a reservoir liable for its leakage and destruction of a neighbor's coal mine); *William Aldred's Case*, 77 Eng. Rep. 816, 821–22 (K.B. 1611) (finding the owner of a hog sty guilty of maintaining a nuisance because of the stench). This emphasis on public purpose explains why many antebellum Americans thought constitutional practices that are presently regarded as clearly unconstitutional. Congressional payments to missionaries, for example, were thought constitutional means of civilizing Native Americans. As the purpose was public, the direct payments to religion were constitutional.

⁶⁶ See DAVID BRIAN ROBERTSON, *THE CONSTITUTION AND AMERICA'S DESTINY* 108 (2005) (“Only the constitutional rules for choosing policy makers, defining their authority, and organizing the policy process” were thought to “stand between . . . ambitious politicians and the pursuit of bad economic policies.”).

⁶⁷ *THE FEDERALIST NO. 10* (James Madison), *supra* note 9, at 83.

⁶⁸ *THE FEDERALIST NO. 57* (James Madison), *supra* note 9, at 352.

⁶⁹ ROBERTSON, *supra* note 66, at 113.

sisted, "ought to be, how are Congress formed? How far are the members interested to preserve your rights?"⁷⁰

Conceptualizing tyranny as rule dedicated to private interests, members of the framing generation believed that the people's representatives could waive the fundamental rights of their constituents when doing so promoted social ends. Private property rights, in particular, were subject to legislative waiver when the public welfare required all individuals to make common sacrifices. Government could take private property by taxation, but only when given permission by electorally accountable officials who could be trusted to exercise taxing and spending powers only in the public interest. "Taxation of the subject," Grey details, "required consent—at least in the . . . sense that it required approval by a body in which the subject was represented."⁷¹ The people, through their elected representatives, determined what portion of their private property would be dedicated to the public good. Daniel Dulany regarded this right of "self-taxation" to be "an essential principle of the English constitution."⁷² "[I]t is an essential unalterable Right in nature," Samuel Adams asserted, "ingrafted into the British Constitution, as a fundamental Law and ever held sacred and irrevocable by the Subjects within the Realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent."⁷³ Taxation with representation reflected a communal decision to abandon certain claims of individual right. Taxation without representation was theft.

Properly designed governing arrangements were better vehicles than parchment guarantees for realizing the eighteenth-century understanding of taxation as voluntary donation. Individuals had no right against any tax on any item in any amount. Whether a tax violated property rights depended on the nature of the institution doing

⁷⁰ 3 DOCUMENTARY HISTORY, *supra* note 20, at 473.

⁷¹ Thomas C. Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843, 870 (1978).

⁷² *Id.* at 875 (quoting Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 610 (B. Bailyn ed., 1965)).

⁷³ Samuel Adams, Letter from the House of Representatives of Massachusetts to the Speakers of other Houses of Representatives (Feb. 11, 1768), in 1 THE WRITINGS OF SAMUEL ADAMS 184, 185 (Henry Alonzo Cushman ed., 1904); see The Declarations of the Stamp Act Congress (1765), in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 62, 63 (Edmund Sears Morgan ed., 1959) ("[N]o Taxes ever have been or can be Constitutionally imposed on ["the [p]eople of these [c]olonies"], but by their respective Legislature."); RAKOVE, *supra* note 28, at 294 ("Of the rights that representative legislatures protected, the most important was that of a people to be taxed only with their freely given consent.").

the taxing, the nature of the tax imposed, and the purposes for which that revenue might be used. The people's representatives could tax whatever they pleased however much they pleased, as long as the tax was general and the revenue directed toward public purposes. Property rights were protected in this regime by governing institutions designed to ensure that taxation burdens were fair and no more than necessary to secure public purposes, not by paper rules limiting the means by which the state could obtain needed revenues.

II. TOWARD ENUMERATION

The participants in the constitutional convention sought to design institutions that would be controlled by persons capable of exercising power wisely and respecting fundamental freedoms. With rare exceptions, debate was limited to the structure of the national government. Once agreement was reached on the composition of the national legislature, agreement on national powers was achieved fairly easily. "From the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted," Madison remembered, "they . . . exceeded all others in zeal for granting powers to the general government."⁷⁴ Responsibility for the precise delineation of federal powers was given to the aptly named "Committee on Detail." Little debate took place after that committee chose to enumerate specific federal powers rather than retain the Virginia Plan's proviso that the federal government be authorized "to legislate in all cases . . . to which the States are separately incompetent."⁷⁵ Three delegates aside, no one worried about the absence of a bill of rights.⁷⁶ What mattered were the rules for staffing the national government and the rules for making national laws, not legal limitations on national power.

⁷⁴ 4 RECORDS, *supra* note 19, at 322; see *id.*, at 255 ("Give N[ew] Jersey an equal vote, and she will dismiss her scruples, and concur in the Nati[ona]l system."); see also RAKOVE, *supra* note 28, at 63–65 (discussing the reception and treatment of the New Jersey Plan); Kramer, *supra* note 11, at 621–22, 643 (describing the New Jersey Plan as an attempt to force concessions from the larger states).

⁷⁵ 2 RECORDS, *supra* note 19, at 26; see John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765, 779–82 (1990) (stating that the Framers' concerns with concluding the Convention drove them to compromise).

⁷⁶ See 2 RECORDS, *supra* note 19, at 587–88 (describing the Convention delegates' rejection on September 12, 1787, of a committee to prepare a bill of rights); see also 13 DOCUMENTARY HISTORY, *supra* note 20, at 195–99 (recording a unanimous rejection by the delegates of a committee to prepare a Bill of Rights).

These constitutional understandings changed between 1787 and 1791. The debate over the Bill of Rights led many leading proponents of ratification to place greater emphasis than they had at the Philadelphia Convention on enumerated powers as a legal protection for fundamental rights. Madison and other prominent Framers also promised amendments enumerating rights in order to assure ratification in New York, Massachusetts and Virginia. Prominent Federalists, however, continued to insist that fundamental freedoms were better protected by the structure of constitutional politics than by rules of constitutional law. The paucity of debate over the shift to enumerated powers combined with the mixed motives Federalists had for championing enumerated rights left unclear whether this increased reliance on enumeration changed the nature of constitutional protections for fundamental rights.

A. *Toward Enumerated Powers*

Whether many delegates thought basic constitutional principles were affected when the Committee on Detail provided a specific enumeration of national powers is doubtful.⁷⁷ The Committee on Detail was instructed to transform a series of resolutions into a constitution. One of those resolutions, proposed by Gunning Bedford of Delaware, asserted that the national government should be vested with the power "to legislate in all Cases for the general Interests of the Union."⁷⁸ Committee members were not authorized to deviate from these sentiments. George Washington asserted that the committee was "to arrange, and draw into method & form the several matters which had been agreed to by the Convention."⁷⁹ No debate on the merits of enumeration took place after the Committee on Detail replaced the general language of Bedford's Resolution with an enumeration of powers augmented by the Necessary and Proper Clause,⁸⁰ even though the Framers had previously regarded enumera-

⁷⁷ *Contra* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 274–76 (2004) (arguing that the delegates' comments suggest that they thought constitutional principles would indeed be affected by the specific enumeration of powers).

⁷⁸ 2 RECORDS, *supra* note 19, at 26, 131.

⁷⁹ 3 *id.* at 65; see Hueston, *supra* note 75, at 768–69 (explaining the creation of the Committee of Detail and its intended purpose).

⁸⁰ See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 19–20 (1999) (discussing the debate surrounding the use of the Necessary and Proper Clause).

tion as unnecessary.⁸¹ Some members of the Convention, most notably Pierce Butler of South Carolina, did hope that the broad language of the Virginia Plan would eventually be replaced by a particular specification.⁸² Nevertheless, no member of the ratifying convention who championed federal power perceived a substantial difference between the enumerated powers listed by the Committee of Detail and the original proposal to vest the national government with the authority to regulate all national concerns. Had the committee "meant to disregard the proposal to confer on Congress the power to legislate in the general interests of the United States," Joseph Lynch observes, "we should expect to read of a discontented Bedford protesting the committee's betrayal of his handiwork, and of a happy Butler supporting the report. That . . . was not the case."⁸³

Federalist rhetoric during the ratification debates further indicates that few notables thought the Committee on Detail had altered the original constitutional design. Proponents of ratification in 1787 and 1788 indiscriminately combined assertions that federal powers were limited with assertions that Congress was authorized to regulate all matters of national importance. *The Federalist No. 39* insisted that federal "jurisdiction extends to certain enumerated objects only."⁸⁴ "The powers delegated by the proposed Constitution to the federal government," Publius later stated, "are few and defined."⁸⁵ Other papers scorned efforts to place legal limits on national power. *The Federalist No. 31* declared that as a general rule "there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation."⁸⁶ Alexander Hamilton in *The Federalist No. 23* wrote that the powers "essential to the common defense . . . ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy

⁸¹ See 1 RECORDS, *supra* note 19, at 53–54 (recording the nearly unanimous vote to give the federal government unenumerated powers); 2 *id.* at 25–27 (recording the assent of the convention to a general grant of powers to the federal government); Hueston, *supra* note 75, at 767–68 (summarizing the acceptance of general grants and rejection of enumeration prior to the formation of the Committee of Detail).

⁸² See 2 RECORDS, *supra* note 19, at 17 (recording Butler's dissatisfaction with the vague general grant of powers).

⁸³ LYNCH, *supra* note 80, at 20.

⁸⁴ THE FEDERALIST NO. 39 (James Madison), *supra* note 9, at 245.

⁸⁵ THE FEDERALIST NO. 45 (James Madison), *supra* note 9, at 292.

⁸⁶ THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 9, at 193.

them.”⁸⁷ Hamilton added that “[a] complete power . . . to procure a regular and adequate supply of revenue,” as well as an absolute power “to borrow as far as its necessities might require” were vital to the Constitution.⁸⁸ Enumeration, these passages suggest, restricted the ends the national government could constitutionally pursue, but not the means by which the national government could pursue constitutional ends.

Many Federalists during the ratification debates disparaged enumerated powers. “Is it, indeed, possible,” Jasper Yeates challenged the members of the Pennsylvania ratifying Convention, “to define any power so accurately, that it shall reach the particular object for which it was given, and yet not be liable to perversion and abuse?”⁸⁹ When Federalists spoke about federal authority, they consistently asserted that the federal government had the power to meet all national concerns. John Jay described the Constitution as forming a “national government, *competent to every national object*”⁹⁰

Few Federalists thought seriously about the legal significance of enumerated powers because they still preferred constitutional politics to constitutional law as the best means for restraining national officials. Proponents of ratification consistently emphasized how national electoral institutions were structured to guarantee that the vast majority of oppressive proposals would not become the law of the land.⁹¹ Federalism was safeguarded by government institutions designed to ensure that all national decisions were made by officials dependent for their offices on local governments or on a local elector-

⁸⁷ THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 9, at 153 (emphasis omitted); *see id.* at 154 (stating that “there can be no limitation of that authority which is to provide for the defense and protection of the community”); 2 DOCUMENTARY HISTORY, *supra* note 20, at 417 (explaining the necessity of delegating sufficient power to the federal government); 8 *id.* at 395 (“It is clear that wherever we give or delegate a trust to do any one act, we must lodge authority sufficient to insure the execution of that act.”); 9 *id.* at 999, 1011, 1016, 1134–35, 1144 (setting out arguments for the delegation of powers to a federal government); 10 *id.* at 1196–97, 1396 (defending the delegation of powers to a federal government).

⁸⁸ THE FEDERALIST NO. 30 (Alexander Hamilton), *supra* note 9, at 188, 192; *see* THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 9, at 195 (explaining why revenue generation is essential to national defense); *see also* 3 DOCUMENTARY HISTORY, *supra* note 20, at 548 (quoting Oliver Ellsworth’s suggestion that a curtailed power to raise revenue would endanger the nation in times of war).

⁸⁹ 2 DOCUMENTARY HISTORY, *supra* note 20, at 438; *see* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 8 *id.* at 97, 101–02 (explaining that the power of regulating trade is essentially undefinable); *see also* 10 *id.* at 1501 (offering Madison’s suggestion that the proposed Constitution is “infinitely more safe” without explicit limitations on national authority).

⁹⁰ 17 *id.* at 111; *see* Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 47–48 (2005) (citing an early resolution of the Constitutional Convention, instructing the draft committees “to legislate in all Cases for the general interests of the Union”).

⁹¹ *See supra* text accompanying notes 39–46.

ate, not by judicial review. "The construction of the [S]enate," Tench Coxe asserted, "affords an absolute certainty, that the states will not lose their present share of separate powers."⁹² The federal judiciary, by comparison, was primarily responsible for ensuring that states respected constitutional mandates.⁹³ Federal Justices were authorized to declare federal laws unconstitutional, but were expected to use that power sparingly. Rakove observes that while the "Framers did intend judicial review to apply to the realm of national legislation, . . . [t]heir decisions on the structure of the national government gave the Framers little reason to worry that Congress would enact or the president approve constitutionally improper statutes that the federal judiciary would feel compelled to overturn."⁹⁴

The general understanding that elected officials, with the approval of their constituents, could waive legal limits on their power when an *ultra vires* action was clearly in the public good, further diminished the practical difference between a government of enumerated powers and one "competent to every national object."⁹⁵ Jefferson claimed such extra-constitutional authority to act in the national interest when authorizing the Louisiana Purchase.⁹⁶ John Nicholas in 1794 informed Congress that while "he had not been able to discover upon what authority the House" had "to grant" money to French refugees:

[H]e had resolved to give his voice in favor of the sufferers: but, when he returned to his constituents, he would honestly tell them that he considered himself as having exceeded his powers, and so cast himself on their mercy.⁹⁷

The long run functioning of the constitutional system in which representatives and executives could plausibly assert this power to transgress constitutional limitations depended on the people having the capacity to elect governing officials with the requisite combination of

⁹² Tench Coxe, *A Freeman III*, in 16 DOCUMENTARY HISTORY, *supra* note 20, at 50; see THE FEDERALIST NOS. 45, 46 (Alexander Hamilton), *supra* note 9 (discussing generally the balance of power among states and the federal government).

⁹³ See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1041–50 (1997) (contending that the primary intent of the Framers in creating the federal judiciary, as exemplified by James Madison's writings, was to prevent the states from becoming "independent, autonomous jurisdictions").

⁹⁴ RAKOVE, *supra* note 28, at 175; see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 73–92 (2004) (stating that the Framers thought judicial review was primarily a check on state law).

⁹⁵ 17 DOCUMENTARY HISTORY, *supra* note 20, at 111.

⁹⁶ See Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), in THOMAS JEFFERSON: WRITINGS 1136 (Merrill D. Peterson ed., 1984).

⁹⁷ 4 ANNALS OF CONG., *supra* note 16, at 172 (Joseph Gales ed., 1834).

abilities and interests, not on the legal maintenance of well-defined enumerated powers.

B. Enumerated Powers and Unenumerated Rights

The decision to enumerate powers did have the unexpected consequence of enabling proponents of ratification to propose a more legal supplement to the original institutional strategy for protecting basic rights. Although no evidence suggests that the Committee on Detail was very concerned with such matters as the freedom of speech and religious liberty, prominent Framers, when responding to Anti-federalist demands for a bill of rights, quickly transformed enumerated powers into a vehicle for guaranteeing fundamental liberties. Led by James Wilson, Federalists during the ratification process insisted that the Constitution of 1787 protected fundamental rights by authorizing the federal government to act only in a few defined circumstances. Enumerating powers, they insisted, made enumerating rights unnecessary. Wilson famously claimed that "congressional authority is to be collected . . . from the positive grant expressed in the instrument of union."⁹⁸ "[E]verything which is not given," he concluded, "is reserved."⁹⁹ Anti-federalists were wrong to insist on provisions asserting a right to free speech because no constitutional provision permitted Congress to regulate expression. "If I have one thousand acres of land, and I grant five hundred acres of it," George Nicholas asked, "must I declare that I retain the other five hundred?"¹⁰⁰ Of course, government might impose some restrictions on advocacy when doing so was necessary to secure such constitutional ends as national security. Such restraints, however, did not violate fundamental rights as fundamental rights were understood in 1787. No one was thought to have a right to threaten national security or otherwise to cause harm. Fundamental rights were primarily rights against partial or class legislation.¹⁰¹ By strictly enumerating government powers, the Framers detailed what constituted the public good

⁹⁸ 2 DOCUMENTARY HISTORY, *supra* note 20, at 167–68.

⁹⁹ *Id.*

¹⁰⁰ 3 DEBATES, *supra* note 36, at 444; *see also* 2 DOCUMENTARY HISTORY, *supra* note 20, at 190, 384, 430, 471, 542, 570 (asserting that enumerated powers would secure unenumerated rights); 3 *id.* at 154, 247, 489–90, 525 (same); 8 *id.* at 213, 311, 369 (same); 9 *id.* at 661, 715, 767, 996, 1012, 1080, 1099–1100, 1135 (same); 10 *id.* at 1223–24, 1350, 1502 (same). *But cf.* 10 *id.* at 1331 (quoting Patrick Henry's belief that the Bill of Rights would prevent later disputes over rights).

¹⁰¹ *See supra* text accompanying notes 46–56.

and ruled out numerous illegitimate justifications for violating fundamental rights.

Anti-federalists rejected these claims that enumerated powers provided adequate protections for unenumerated rights. They feared that the enumerated powers in Article I were so vaguely worded that political actors could easily pass off rights violations as efforts to secure national interests. "Who can overrule the[] pretensions" of Congress that any particular "law is necessary and proper," "Old Whig" asked. "No one, unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power."¹⁰² More importantly, Anti-federalists feared that the national government was likely to be staffed by elites prone to violate the liberties of more ordinary persons.¹⁰³ Prominent Anti-federalists combined calls for enumerating rights with calls for changes in the structure of the national government that would privilege the election of national officials less inclined to violate fundamental freedoms. "If ever there was a case for an explicit reservation of individual rights," opponents of ratification believed, "the proposed constitution provided one, with its very extensive powers, its shadow of genuine representation, and its weak and dubious checks on the encroachments of the few."¹⁰⁴ As concerned with the structure of the national government as with the lack of a bill of rights, the fundamental Anti-federalist challenge to the Constitution was more directed at the original institutional strategy for protecting fundamental freedoms than at the legal addendum jerryrigged during the ratification process.

Madison responded to these Anti-federalist concerns by severing their legal analysis from their more vital political analysis. He and his political allies were more than willing, after the Constitution was ratified, to enumerate some fundamental rights if that would appease more moderate opponents of ratification. That enumeration, however, was justified only as a supplement to the more fundamental institutional protections for basic liberties. Madison was unwilling to make any constitutional change that might affect what he believed were the best governing arrangements for protecting rights. By consciously adding some constitutional law without consciously changing the underlying constitutional politics, Madison inadvertently laid the

¹⁰² *Essays of an Old Whig*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 21, at 25.

¹⁰³ See 1 *id.* at 48 ("More precisely the Anti-federalists see the chief danger as the inherently aristocratic character of any government.")

¹⁰⁴ *Id.* at 69.

ground for the contemporary distinction between enumerated and unenumerated rights.

III. THE VIEW FROM 1791

The persons responsible for the Bill of Rights regarded enumeration as a minor supplement to the institutional strategies crafted in 1787 for protecting fundamental liberties. When commenting on Madison's proposed constitutional amendments, prominent Framers were most likely to praise their tendency to alleviate Anti-federalist fears without vitiating Federalist principles. This desire to pacify political opponents better explains what liberties were specified by the Bill of Rights than do founding beliefs that the rights enumerated were more fundamental than the rights not explicitly mentioned. Proponents of the Bill of Rights, thinking that well-designed governing institutions best secured fundamental freedoms, expressed little concern when confronted with claims that many enumerated rights were too vague to have clear legal meanings. Madison and his political allies, however, responded aggressively and decisively when former Anti-federalists proposed amendments that would alter what Federalists believed were governing arrangements particularly conducive to protecting fundamental freedoms.

A. *Why Enumerate?*

James Madison in his less-than-moving speech introducing the Bill of Rights proclaimed that enumerating rights in a constitution "was neither improper nor altogether useless."¹⁰⁵ Enumeration might foster public support for fundamental freedoms. Constitutional provisions protecting various liberties, Madison declared, "have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community . . ."¹⁰⁶ Local officials would find constitutional declarations of rights useful when they sought to restrain the national power. Madison stated, "such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government . . ."¹⁰⁷ Enumerated rights would enable the federal judiciary to protect the people's liberties. "If [in-

¹⁰⁵ 1 ANNALS OF CONG., *supra* note 16, at 453.

¹⁰⁶ *Id.* at 455.

¹⁰⁷ *Id.* at 457.

dividual rights provisions] are incorporated into the Constitution," Madison informed the First Congress, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."¹⁰⁸

Madison's proposed Bill of Rights, with the exception of several provisions later rejected,¹⁰⁹ was not designed to add rights to those that the original Constitution was expected to protect. The problem with the Constitution, he believed, was the perception that "it did not contain *effectual* provisions against encroachments on particular rights"¹¹⁰ Enumeration provided that additional security. As Madison asserted, "it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner that is now done"¹¹¹ His goal was to "fortify the rights of the people against encroachments of the Government."¹¹² A textual ban on general warrants, for example, by plainly stating in the constitutional text that such practices were not legitimate means for pursuing constitutional ends might prevent the passage of oppressive laws that Madison believed, under the unamended Constitution, were "neither necessary nor proper."¹¹³

B. Enumeration from the Perspective of 1787

The leading proponents of the Federal Constitution in the First Congress wanted a bill of rights that would alleviate public anxieties about fundamental rights while maintaining intact the constitutional politics envisioned in 1787. Tench Coxe urged his political allies to propose amendments that would enable them to "gain strength & respectability without impairing one essential power of the constitution."¹¹⁴ Other Federalists endorsed similar conciliatory and preservationist goals when urging constitutional reform. Paine Wingate informed Timothy Pickering that proposed amendments might "quiet the fears & jealousies of the well designing & not affect the es-

¹⁰⁸ *Id.*

¹⁰⁹ These exceptions were the proposed amendments on congressional apportionment, congressional pay raises, and limitations on state power to infringe fundamental rights. *Id.* at 457–58.

¹¹⁰ *Id.* at 450 (emphasis added).

¹¹¹ *Id.* at 449–50.

¹¹² *Id.* at 459.

¹¹³ *Id.* at 456.

¹¹⁴ Letter from Tench Coxe to George Thatcher (Mar. 12, 1789), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 217–18 (Helen E. Veit et al. eds., Johns Hopkins Univ. Press 1991) [hereinafter *CREATING*].

entials of the system."¹¹⁵ Benjamin Hawkins urged James Madison to "do something by way of amendments without any material injury to the system."¹¹⁶

Madison's proposed Bill of Rights was aimed at simultaneously appeasing Anti-federalists and preserving Federalist institutions. His plan, Madison told Jefferson, was to provide those "alterations most called for by the opponents of the Government and least objectionable to its friends."¹¹⁷ Madison informed Samuel Johnston that what would become the Bill of Rights "aims at the twofold object of removing the fears of the discontented, and of avoiding all such alterations as would . . . displease the adverse side"¹¹⁸ Proponents of the Bill of Rights praised Madison for securing both goals. "[T]he great Principles of the Constitution are preserved," Thomas Hartley asserted, "and the Declarations and Explanations will be acceptable to the People."¹¹⁹

Many prominent Federalists regarded the Bill of Rights as little more than a meaningless "sop" to their political opponents.¹²⁰ Theo-

¹¹⁵ Letter from Paine Wingate to Timothy Pickering (Mar. 25, 1789), in *CREATING*, *supra* note 114, at 223; *see* Letter from Henry Gibbs to Roger Sherman (July 16, 1789), in *CREATING*, *supra* note 114, at 263 (endorsing amendments that "without giving umbrage to the friends of the new plan of Government tend greatly to conciliate the minds of many of it's [sic] Opponents").

¹¹⁶ Letter from Benjamin Hawkins to James Madison (June 1, 1789), in *CREATING*, *supra* note 114, at 243; *see* Letter from James Madison to Thomas Jefferson (Mar. 29, 1789), in *CREATING*, *supra* note 114, at 225 ("[S]ome conciliatory sacrifices will be made, in order to extinguish opposition to the system"); *see also* Letter from Tench Coxe to James Madison (Apr. 21, 1789), in *CREATING*, *supra* note 114, at 230–31 (noting that a bill of rights would "remove fears"); Letter from Nathan Dane to George Thatcher (May 31, 1789), in *CREATING*, *supra* note 114, at 242 ("[W]ill not declaring the rights expressly and fortifying the liberties of the Country more explicitly induce confidence and there by infact add Strength to the government"); Letter from John Dawson to James Madison (June 28, 1789), in *CREATING*, *supra* note 114, at 255–56 (urging Madison to propose amendments "most of which will not materially effect the system, but will render it more secure, and more agreeable in the eyes of those who were oppos'd to its establishment").

¹¹⁷ Letter from James Madison to Thomas Jefferson (May 27, 1789), in *CREATING*, *supra* note 114, at 240.

¹¹⁸ Letter from James Madison to Samuel Johnston (June 21, 1789), in *CREATING*, *supra* note 114, at 253; *see* Letter from James Madison to Tench Coxe (June 24, 1789) in *CREATING*, *supra* note 114, at 254 ("[I]t is much to be wished that the discon[ten]ted part of our fellow Citizens could be reconciled to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution in its present form.") (alteration in original); *see also* Letter from James Madison to James Madison, Sr. (July 5, 1789), in *CREATING*, *supra* note 114, at 259 ("I hope [the subject of amendments] will end in such a recommendation as will satisfy moderate opponents."); Letter from James Madison to Richard Peters (Aug. 19, 1789), in *CREATING*, *supra* note 114, at 281–82 ("[Amendments] will kill the opposition every where.").

¹¹⁹ Letter from Thomas Hartley to Tench Coxe (Aug. 23, 1789), in *CREATING*, *supra* note 114, at 286.

¹²⁰ *See* JOHNSON, *supra* note 14, at 9.

dore Sedgwick, while opposed in principle to Madison's proposed amendments, thought their ratification politically necessary only if the liberties enumerated were politically sterile. Congress "must adopt [the proposed amendments] in every instance," he asserted, "in which they will not shackle the operations of the government."¹²¹ George Washington approved such efforts to appease the moderate opposition. While he concluded some amendments were "importantly necessary," many others were "necessary" only "to quiet the fears of some respectable characters and well-meaning men."¹²² Similar sentiments were articulated by numerous leading actors in the First Congress. Fisher Ames thought Madison's proposals "may do some good towards quieting men who attend to sounds only, and may get the mover some popularity"¹²³ Enumeration as a strategy for protecting fundamental rights, however, was silly. Ames believed specifying "[t]he rights of conscience, of bearing arms" and "[f]reedom of the press" in the constitutional text would "stimulate the stomach as little as hasty-pudding."¹²⁴

Ames's political allies agreed that the proposed constitutional amendments were largely symbolic. "[T]he addition of a little Flourish & Dressing without injuring the substantial part or adding much to its intrinsic value," Samuel Johnston wrote, "may have a happy effect in complimenting the Judgment of those who have themselves up in Opposition to [the Constitution]"¹²⁵ Roger Sherman observed that Madison's proposals "will probaly [sic] be harmless & satisfactory to those who are fond of Bills of rights"¹²⁶ Abraham

¹²¹ Letter from Theodore Sedgwick to Benjamin Lincoln (July 19, 1789), in *CREATING*, *supra* note 114, at 263–64.

¹²² Letter from George Washington to James Madison (May 31, 1789), in *CREATING*, *supra* note 114, at 242; see Letter from Fisher Ames to George R. Minot (July 23, 1789), in *CREATING*, *supra* note 114, at 269 ("[I]t is necessary to conciliate, and I would have amendments.").

¹²³ Letter from Fisher Ames to Thomas Dwight (June 11, 1789), in *CREATING*, *supra* note 114, at 247.

¹²⁴ Letter from Fisher Ames to George R. Minot (June 12, 1789), in *CREATING*, *supra* note 114, at 247–48; see Letter from Fisher Ames to Caleb Strong (Sept. 15, 1789), in *CREATING*, *supra* note 114, at 297 ("Mr. Madison, in particular, thinks that [the amendments] have lost much of their Sedative Virtue by the alteration [of the Senate]"). *But cf.* Letter from George Clymer to Tench Coxe (June 28, 1789), in *CREATING*, *supra* note 114, at 255 ("[Madison] has given his malades imaginaires bread pills powder of paste & neutral mixtures to keep them in play").

¹²⁵ Letter from Samuel Johnston to James Madison (July 8, 1789), in *CREATING*, *supra* note 114, at 260; see Letter from Lambert Cadwalader to George Mitchell (July 22, 1789), in *CREATING*, *supra* note 114, at 268 ("[T]he [ugh] of little or no Consequence [the amendments] will calm the Turbulence of the Opposition"); see also Letter from William Smith (S.C.) to Edward Rutledge (Aug. 9, 1789), in *CREATING*, *supra* note 114, at 272 ("[Amendments] are thought inoffensive to the federalists & may do some good on the other side.").

¹²⁶ Letter from Roger Sherman to Henry Gibbs (Aug. 4, 1789), in *CREATING*, *supra* note 114, at 271.

Baldwin thought that Madison was trying to “tranquillize the minds of honest opposers without injuring the system.”¹²⁷ The Bill of Rights, Edmund Randolph concurred, was “an anodyne to the discontented.”¹²⁸ Some crucial “discontented” were political leaders in the two states that, in the summer of 1789, had not yet ratified the new constitutional regime. Benjamin Goodhue, when celebrating the “probability of giving quiet by so cheap a purchase”¹²⁹ hoped that meaningless amendments would “give general satisfaction and accelerate the adoption of the Constitution by the States of N. Carolina and R. Island.”¹³⁰

William L. Smith, the rare Federalist member of the First Congress who thought a bill of rights would provide vital constitutional restrictions on national power, nevertheless regarded enumeration as a secondary means for securing fundamental freedoms and was far more concerned with gaining additional legal protections for southern interests than with providing better guarantees for basic human

¹²⁷ Letter from Abraham Baldwin to Joel Barlow (June 14, 1789), in *CREATING*, *supra* note 114, at 250; see Letter from George Gale to William Tilghman (June 17, 1789), in *CREATING*, *supra* note 114, at 252 (“I trust you will think the most of [the amendments] Innocent . . .”); see also Letter from Pierce Butler to James Iredell (Aug. 11, 1789), in *CREATING*, *supra* note 114, at 274 (“A few milk-and-water amendments have been proposed . . .”); Letter from William Ellery to Benjamin Huntington (Aug. 24, 1789), in *CREATING*, *supra* note 114, at 287 (“[T]hose proposed are indeed very innocent, and the admission of them might gratify the pride of some opposers of the New Government . . .”); Letter from Robert Morris to Richard Peters (Aug. 24, 1789), in *CREATING*, *supra* note 114, at 288 (“[T]he Senate should adopt the whole of them by the Lump as containing neither good or Harm being perfectly innocent.”); Letter from Peter Silvester to Peter Van Schaack (July 1, 1789), in *CREATING*, *supra* note 114, at 258 (“I should like to say something clever in favor of it so far as it does not injure the system . . .”).

¹²⁸ Letter from Edmund Randolph to James Madison (June 30, 1789), in *CREATING*, *supra* note 114, at 256–57; see Letter from Benjamin Hawkins to James Madison (July 3, 1789), in *CREATING*, *supra* note 114, at 258 (“If it should appear in the investigation that there are difficulties greater than you seem to apprehend, I wish that the subject could be postponed ‘till after the meeting of [the North Carolina ratification convention].’”); see also Letter from William Ellery to Benjamin Huntington (July 13, 1789), in *CREATING*, *supra* note 114, at 262–63 (“Take away this false ground, and if they then stand out, they will stand, . . . upon nothing.”); Letter from Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), in *CREATING*, *supra* note 114, at 280–81 (“I hope it may restore Harmony & unanimity amongst our fellow Citizens . . .”); Letter from Edmund Pendleton to James Madison (Sept. 2, 1789), in *CREATING*, *supra* note 114, at 291 (“[Amending the Constitution] will have a good effect in quieting the minds of many well meaning Citizens . . .”); Letter from Richard Peters to James Madison (July 5, 1789), in *CREATING*, *supra* note 114 at 259 (“[Y]ou know more of the Necessity of such Accommodations than I do.”).

¹²⁹ Letter from Benjamin Goodhue to Michael Hodge (July 30, 1789), in *CREATING*, *supra* note 114, at 269; see Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), in *CREATING*, *supra* note 114, at 264 (“I believe it will be thought to be good policy to propose such as will not injure the constitution and which may serve to quiet the honest part of the dissatisfied . . .”).

¹³⁰ Letter from Benjamin Goodhue to Michael Hodge (Aug. 20, 1789), in *CREATING*, *supra* note 114, at 283.

rights. As did northern Federalists, Smith favored amendments that would "more effectually secure private rights, without affecting the structure of the Govt."¹³¹ Slavery was the "private right" Smith sought to "more effectually secure." The South Carolina Federalist supported a constitutional declaration that "the enumeration of certain rights shall not be so construed as to deny others retained by the people" because he believed that such an amendment "will go a great way in preventing Congress from interfering with our negroes after 20 years or prohibiting the importation of them."¹³² Smith's claim that the amended Constitution provided stronger protections for slave-holding rights was the only contemporaneous construction by a national official in 1789 of the liberties originally thought to be better secured by the Ninth Amendment.

The Federalist concern with appeasing their political opponents dictated the liberties specified in the Bill of Rights. Madison repeatedly asserted that the proposed amendments should be limited to those that were sufficiently uncontroversial as to guarantee passage. The particular freedoms he proposed enumerating would "reconcile" the "discon[ten]ted part of our fellow Citizens . . . to the Government they have opposed, and by means as little as possible unacceptable to those who approve the Constitution . . ."¹³³ Controversial proposals were rejected simply because they were controversial. Madison sought to "avoid[] all controvertible points which might endanger the assent of 2/3 of each branch of Congs., and 3/4 of the State Legislatures."¹³⁴ Amendments submitted by state legislatures were included where possible because "the principle [sic] design of the[] amendments was to conciliate the minds of the people" and not to list the most important rights of American citizens.¹³⁵ Madison proposed enumerating the freedom of religion because that "had been required by some of the State Conventions," not because of any virtue inherent in enumerating that right. "Whether the words [were] necessary or not, he did not mean to say . . ."¹³⁶ Madison favored an amendment limiting federal appellate jurisdiction over state courts to

¹³¹ Letter from William L. Smith (S.C.) to Edward Rutledge (Aug. 9, 1789), in *CREATING*, *supra* note 114, at 272-73.

¹³² Letter from William L. Smith (S.C.) to Edward Rutledge (Aug. 10, 1789), in *CREATING*, *supra* note 114, at 273.

¹³³ Letter from James Madison to Tench Coxe (June 24 1789), in *CREATING*, *supra* note 114, at 254.

¹³⁴ *Id.*

¹³⁵ *THE DAILY ADVERTIZER*, Aug. 15, 1789, in *CREATING*, *supra* note 114, at 131 (reprinting of a speech by Madison made on August 14, 1789).

¹³⁶ 1 *ANNALS OF CONG.*, *supra* note 16, at 758.

cases worth more than one thousand dollars, even though he thought there was “little danger that any court in the United States will admit an appeal where the matter in dispute does not amount to a thousand dollars.”¹³⁷ Enumeration was politically valuable because “the possibility of such an event has excited in the minds of many citizens the greatest apprehension that persons of opulence would carry a cause from the extremities of the Union to the Supreme Court”¹³⁸ Other Federalists urged their colleagues to support whatever liberties would conciliate former Anti-federalists, no matter how fundamental or trivial they regarded the right in question. John Vining tolerated the decision to insert a right of assembly in the Constitution because “the thing was harmless, and, it would tend to gratify the States that had proposed amendments”¹³⁹ Thomas Hartley would “gratify” all state requests for specific constitutional provisions, as long as the amendment “was not incompatible with the general good”¹⁴⁰

No proponent of the Bill of Rights asserted that the rights enumerated by Madison’s proposed amendments were more important than the rights not enumerated. When Theodore Sedgwick suggested that the right to assembly was too “trifl[ing]” to be inserted into “a declaration of rights,”¹⁴¹ most representatives responded that such a provision had been demanded by the states and was unlikely to cause trouble.¹⁴² Few claimed the right fundamental. John Page’s assertion that “inserting the privilege [of assembly] in the declaration of rights” was necessary because “such rights have been opposed”¹⁴³ was the only recorded comment from the House debate in which a speaker explained why enumeration might be a particularly good means for protecting some freedoms rather than others. Madison may have hoped that enumerating restrictions on state power to violate certain fundamental rights would better secure various liberties against local violations. That proposal, however, was defeated.¹⁴⁴

The conciliatory concerns that motivated Federalists to frame the Bill of Rights and their underlying commitment to securing fundamental rights through well-designed governing institutions explains

¹³⁷ *Id.* at 784.

¹³⁸ *Id.*

¹³⁹ *Id.* at 760.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *supra* text accompanying notes 129–31.

¹⁴³ 1 ANNALS OF CONG., *supra* note 16, at 760.

¹⁴⁴ 1 JOURNAL OF THE SENATE 73 (Joseph Gales & William Seaton eds., 1834).

why the political leadership of the First Congress ignored occasional assertions that proposed amendments lacked clear legal meanings. Many Federalists in 1787 had opposed a bill of rights, in part, because they insisted parchment declarations could not resolve disputes over the scope of the rights declared. James Wilson, during the Pennsylvania ratifying Convention stated, "[t]he cases open to a jury, differed in the different states; it was therefore impracticable, on that ground, to have made a general rule."¹⁴⁵ These concerns with vagueness and ambiguity were repeated during the debates over the Bill of Rights without having any visible influence on the status of the proposed amendments. Samuel Livermore thought what became the Eighth Amendment had "no meaning in it." "What is meant by the terms excessive bail," he asked. "What is understood by excessive fines?"¹⁴⁶ Immediately after that speech, the House of Representatives approved the proposed amendment by a large margin.¹⁴⁷ James Madison confessed that the right to a jury trial remained contested despite the Sixth Amendment. "The truth," he told Edmund Pendleton, "is that in most of the States the practice is different and hence the irreconcilable difference of ideas on the subject."¹⁴⁸ This "truth" that enumeration failed to settle ongoing legal disputes over what constituted a proper jury trial apparently did not even delay the decision to send the proposed amendment mandating jury trials to the states.

Federalists who thought political protections fundamental and enumeration a means of conciliating political rivals did not consider at any length whether the particular language Madison employed when enumerating rights encompassed particular practices. Rare questions about the scope of proposed constitutional provisions were

¹⁴⁵ James Wilson, Speech to the Convention State House (Oct. 10, 1787), in *FRIENDS OF THE CONSTITUTION*, *supra* note 27, at 102, 104; see Essay, *A Federalist*, *INDEP. GAZETTEER* (Oct. 25, 1787), reprinted in *FRIENDS OF THE CONSTITUTION*, *supra* note 27, at 41 ("[I]t is well known that the cases which come before a jury, are not the same in all the States."); *One of the Middling-Interest*, *MASS. CENTINEL*, Nov. 28, 1787, reprinted in 4 *DOCUMENTARY HISTORY*, *supra* note 20, at 331 ("[T]he convention have not said that trial by jury in civil cases is indispensable as they have in criminal cases [F]or there is no one point in which the states more differ than this"); 10 *id.* at 1352 ("Let him put his finger on the part [in the Constitution] where [the right to trial by jury] is abolished."); *THE FEDERALIST* No. 84 (Alexander Hamilton), *supra* note 9, at 511. *But cf.* Letter from George Washington to Marquis de Lafayette (Apr. 28, 1788) in 9 *DOCUMENTARY HISTORY*, *supra* note 20, at 767 ("For example: there was not a member of the convention . . . who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Trial by Jury*.") (alteration in original).

¹⁴⁶ 1 *ANNALS OF CONG.*, *supra* note 16, at 782.

¹⁴⁷ *Id.* at 783.

¹⁴⁸ Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in *CREATING*, *supra* note 114, at 297, 298.

brushed aside without resolution. No representative responded when Egbert Benson expressed concern that proposed constitutional protections for religious freedoms might be interpreted as requiring exemptions for those with religious scruples against engaging in military combat.¹⁴⁹ “[A]n enumeration of simple, acknowledged principles”¹⁵⁰ adequately served Federalist political needs. Madison and his political allies had no political reason to resolve ongoing controversies about the best application of those principles.

Contemporary efforts to uncover the original meaning of liberties secured by the Bill of Rights are, thus, largely futile because Federalists in 1789 consciously enumerated general principles whose practical applications they knew were contestable. Madison understood that the constitutional meaning of “free exercise,” “an impartial jury,” and other matters left legally undecided in 1787 and 1791 would be settled by “a series of [subsequent] discussions and adjudications.”¹⁵¹ Constitutional politics, not constitutional law, remained the primary line of defense against abusive official actions. Fundamental freedoms would be secure, Federalists thought, as long as constitutional processes yielded governing officials who had the combination of abilities and interests necessary to recognize the fundamental liberties of their fellow citizens and to act on that judgment.

Prominent supporters of the Bill of Rights expressed concern with substantive issues only when Anti-federalists proposed amendments aimed at adjusting the constitutional politics Federalists thought would best protect fundamental rights. Federalist willingness to accommodate their political opponents came to an abrupt halt when Thomas Tudor Tucker moved that the House of Representatives add “to instruct their representatives” to what became the first amendment.¹⁵² Critics of the original constitution regarded such a right as central to a popular regime. “Instruction and representation in a republic,” John Page declared, “appear to me to be inseparably connected.”¹⁵³ Elbridge Gerry regarded “[i]nstruction from the people” as “an additional check against abuses.”¹⁵⁴ The leading proponents of the Bill of Rights vigorously rejected this effort to change the nature of constitutional representation. George Clymer declared, “independent and deliberative bod[ies]” were “essential requisites in the

¹⁴⁹ See 1 ANNALS OF CONG., *supra* note 16, at 779–80.

¹⁵⁰ *Id.* at 766.

¹⁵¹ THE FEDERALIST NO. 37 (James Madison), *supra* note 9, at 229.

¹⁵² 1 ANNALS OF CONG., *supra* note 16, at 761.

¹⁵³ *Id.* at 762.

¹⁵⁴ *Id.* at 764.

Legislatures of free Governments.”¹⁵⁵ Hartley regarded instructions as a tool of faction, the greatest perceived threat to freedom in the late-eighteenth century. “When the passions of the people are excited,” he stated, “instructions have been resorted to and obtained, to answer party purposes.”¹⁵⁶

Federalists during the debate over instructions consistently proclaimed that fundamental freedoms were best protected by a national, republican aristocracy.¹⁵⁷ Sedgwick insisted that congressmen were “representatives of the great body of the people” of “the whole Union.” If national legislators began regarding themselves as representing a particular state or district, he stated, “the greatest security the people have for their rights and privileges is destroyed.”¹⁵⁸ Other representatives emphasized how instructions substituted parochial visions for the deliberation about the public welfare Federalists thought essential to protecting rights. “The great end of meeting,” Hartley asserted, “is to consult for the common good.” In his view, the more “local or partial view” that was likely to underlie instructions “does not necessarily enable any man to comprehend it clearly.”¹⁵⁹ Sherman condemned instructions for interfering with the “duty of a good representative to inquire what measures are most likely to promote the general welfare.”¹⁶⁰ These comments expressed two core Federalist commitments: legislation aimed at the common good did not violate fundamental rights¹⁶¹ and that the best way to secure the common good was to develop an electoral system that enabled particularly virtuous persons to deliberate about the general welfare.¹⁶² Instructions threatened rights, Clymer thought, because “they prevent men of abilities and experience from rendering those services to the community that are in their power.”¹⁶³

Most Anti-federalists complained bitterly that the proposed constitutional amendments did not alter how they perceived the flawed original institutional protections for fundamental rights. Gerry declared that Madison’s efforts would only “reconcile those who had no

¹⁵⁵ *Id.* at 763.

¹⁵⁶ *Id.* at 761.

¹⁵⁷ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 492 (1969) (“[A]ll of what the Federalists wanted out of the new central government seemed in the final analysis dependent upon the prerequisite maintenance of aristocratic politics.”).

¹⁵⁸ 1 ANNALS OF CONG., *supra* note 16, at 771.

¹⁵⁹ *Id.* at 762.

¹⁶⁰ *Id.* at 764.

¹⁶¹ See *supra* notes 46–56 and accompanying text.

¹⁶² See *supra* notes 39–46 and accompanying text.

¹⁶³ 1 ANNALS OF CONG., *supra* note 16, at 763.

adequate idea of the essential defects of the Constitution."¹⁶⁴ These defects lay in the structure of the national government and the powers vested in that government. Richard Henry Lee and William Grayson remained "apprehensive for Civil Liberty" because the "impracticability . . . of carrying Representation sufficiently near to the people . . . compels a resort to fear resulting from great force, and excessive power in government."¹⁶⁵ "Some valuable Rights are indeed *declared*," Lee fretted, "but the powers that remain are very sufficient to render them nugatory at pleasure."¹⁶⁶ Many Anti-federalists echoed the Federalist critique of enumeration as symbolic politics. Parchment barriers were meaningless, Patrick Henry complained, "[f]or Right without her Power & Might is but a Shadow."¹⁶⁷ Lee agreed that "right without power to protect it, is of little avail."¹⁶⁸ George Mason seems to have been the only leading Anti-federalist who "received much Satisfaction from the Amendments to the Federal Constitution."¹⁶⁹ The liberties enumerated in the Bill of Rights, most opponents of ratification concluded, were "mutilated and enfeebled,"¹⁷⁰ "good for nothing,"¹⁷¹ and "calculated merely to amuse, or rather to deceive."¹⁷²

¹⁶⁴ Letter from Elbridge Gerry to John Wendell (Sept. 14, 1789), in *CREATING*, *supra* note 114, at 294.

¹⁶⁵ Letter from Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Delegates (Sept. 28, 1789), in *CREATING*, *supra* note 114, at 299–300; see Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in *CREATING*, *supra* note 114, at 295–96 ("[E]xtended representation, know[ledge of] characters, and confidence in consequence, [*are wanting to sway the*] opinion of Rulers, without which, *fear the offspr[ing of force]* can alone answer.").

¹⁶⁶ Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in *CREATING*, *supra* note 114, at 295; see Letter from Samuel Chase to Richard Henry Lee (May 16, 1789), in *CREATING*, *supra* note 114, at 240 ("I fear that no Check will be placed on the Exercise of any of the powers granted."); Letter from Richard Henry Lee to Samuel Adams (Apr. 25, 1789), in *CREATING*, *supra* note 114, at 233 ("[T]he safety of liberty depends not so much upon the *gracious manner*, as upon the *Limitation of Power*.").

¹⁶⁷ Letter from Patrick Henry to Richard Henry Lee (Aug. 28, 1789), in *CREATING*, *supra* note 114, at 289.

¹⁶⁸ Letter from Richard Henry Lee to Patrick Henry (Sept. 27, 1789), in *CREATING*, *supra* note 114, at 298.

¹⁶⁹ Letter from George Mason to Samuel Griffin (Sept. 8, 1789), in *CREATING*, *supra* note 114, at 292.

¹⁷⁰ Letter from Richard Henry Lee to Francis Lightfoot Lee (Sept. 13, 1789), in *CREATING*, *supra* note 114, at 294; see Letter from Theodorick Bland Randolph to St. George Tucker (Sept. 9, 1789), in *CREATING*, *supra* note 114, at 293 ("[I]n my opinion they have not made one material [amendment].").

¹⁷¹ Letter from William Grayson to Patrick Henry (Sept. 29, 1789), in *CREATING*, *supra* note 114, at 300.

¹⁷² Letter from Thomas Tudor Tucker to St. George Tucker (Oct. 2, 1789), in *CREATING*, *supra* note 114, at 300.

The Federalists who sponsored the Bill of Rights were no more excited by enumeration. Madison complained of "the nauseous project of amendments."¹⁷³ His political allies spoke of "this disagreeable Business,"¹⁷⁴ "the unpromising subject of amendments,"¹⁷⁵ and "the wearisome business of amendments."¹⁷⁶ Richard Morris thought the effort a "[w]aste of precious time."¹⁷⁷ Most were happy that, after sending the proposed amendments to the states, Congress could finally return to substantive business. William Ellery expressed this common sentiment when he asserted, "I don't think the amendments will do any hurt, and they may do some good, and therefore I don't consider them as of much importance."¹⁷⁸ "God grant it may have the effects which are desired," an exhausted Benjamin Goodhue stated, "and that We may never hear any more of it"¹⁷⁹

IV. *MARBURY* AND ENUMERATION TRIUMPHANT?

A. *Enumerated Rights in Action*

Americans would soon hear much more of the Bill of Rights, particularly when they paid more attention to legislative proposals than to judicial decisions. Federalists and Jeffersonians at the turn of the nineteenth century debated at great length whether the Sedition Act of 1798 was consistent with the First Amendment and the enumerated powers of the national government.¹⁸⁰ James Madison during the War of 1812 informed Joseph Story that a proposed ban on sedi-

¹⁷³ Letter from James Madison to Richard Peters (Aug. 19, 1789), in *CREATING*, *supra* note 114, at 281.

¹⁷⁴ Letter from Frederick A. Muhlenberg to Benjamin Rush (Aug. 18, 1789), in *CREATING*, *supra* note 114, at 280.

¹⁷⁵ Letter from Theodore Sedgwick to Pamela Sedgwick (Aug. 20, 1789), in *CREATING*, *supra* note 114, at 283.

¹⁷⁶ Letter from Benjamin Goodhue to the Salem Insurance Offices (Aug. 23, 1789), in *CREATING*, *supra* note 114, at 285.

¹⁷⁷ Letter from Robert Morris to Richard Peters (Aug. 24, 1789), in *CREATING*, *supra* note 114, at 288.

¹⁷⁸ Letter from William Ellery to Benjamin Huntington (Sept. 8, 1789), in *CREATING*, *supra* note 114, at 291.

¹⁷⁹ Letter from Benjamin Goodhue to the Salem Insurance Offices (Aug. 23, 1789), in *CREATING*, *supra* note 114, at 286.

¹⁸⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 260-62 (Univ. of Chi. Press 1997) (citing the various arguments made for and against the constitutionality of the Act); MICHAEL KENT CURTIS, *FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE* 52-79 (Duke Univ. Press 2000) (referring to the legislature's struggle to draft the Act and the public debate that followed).

tion was unconstitutional.¹⁸¹ First Amendment protections for freedom of religion were invoked when presidents considered issuing calls for a day of prayer,¹⁸² and when Congress debated appointing legislative chaplains.¹⁸³ Proponents and opponents of slavery before the Civil War debated at great length whether proposed national restrictions on antislavery advocacy were consistent with the First Amendment and the enumerated powers of the national government.¹⁸⁴ Whether the first ten Amendments limited federal power in the territories was another subject of ongoing legislative debate in antebellum America.¹⁸⁵

Federal Justices before the Civil War were slower to invoke the individual rights enumerated in the first ten amendments to the Constitution. The Marshall and Taney Courts more aggressively limited federal power than is commonly thought.¹⁸⁶ The Justices, when restraining the national government, however, tended to base decisions on the unenumerated right not to be divested of private property than on any specific constitutional provision.¹⁸⁷ In *Polk's Lessee v. Wendal & Al.*, Chief Justice Marshall proclaimed as one of "the great principles of justice and law" that government could not give title to property that the government did not own.¹⁸⁸ "[A] grant is absolutely void," he asserted without pointing to any constitutional text, when "the state has no title to the thing granted."¹⁸⁹ William L. Smith might

¹⁸¹ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1809*, at 166 (Univ. of Chi. Press 2001) [hereinafter *THE JEFFERSONIANS*] (noting Madison's resistance to pressure to suppress sedition on both political and constitutional grounds).

¹⁸² See *id.* at 5 (stating that Jefferson would not proclaim a day of thanksgiving in part because the Constitution did not grant the federal government authority over religion); see also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829–1861*, at 143–45 (Univ. of Chi. Press 2005) [hereinafter *DEMOCRATS AND WHIGS*] (questioning the government's authority under the Constitution to prescribe a day of prayer).

¹⁸³ See *DEMOCRATS AND WHIGS*, *supra* note 182, at 146–48 (referencing the objections of congressmen to the appointment and funding of congressional chaplains). For other antebellum legislative debates over the constitutional meaning of religious freedom, see *THE JEFFERSONIANS*, *supra* note 181, at 318–29.

¹⁸⁴ See CURTIS, *supra* note 180, at 155–93 (discussing the First Amendment's role in the attempt to suppress abolitionist literature in the South).

¹⁸⁵ See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 73–81 (1996) (examining the various theories concerning the federal government's power to govern new territories).

¹⁸⁶ See Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73, 78–106 (2000) (discussing several cases in which the Supreme Court refused to allow the government to effect naked land transfers).

¹⁸⁷ See *id.* at 85 (stating that the land takings cases "raised fundamental natural law issues—issues the justices would resolve by reference to general principles rather than by positive constitutional law").

¹⁸⁸ 13 U.S. (9 Cranch) 87, 99 (1815).

¹⁸⁹ *Id.*

have been pleased that the Supreme Court first invoked the Bill of Rights as a limit on federal power when providing protections for slavery in *Dred Scott v. Sandford*, although Chief Justice Roger Taney's opinion relied on the Due Process Clause of the Fifth Amendment rather than on the Ninth Amendment.¹⁹⁰

Federal Justices more frequently cited the Bill of Rights after the Civil War. The Supreme Court at the turn of the twentieth century occasionally invoked the Fourth and Fifth Amendments when limiting national power.¹⁹¹ Numerous judicial decisions handed down after 1950 asserted that state power to violate fundamental rights was limited by the Bill of Rights as incorporated by the Due Process Clause of the Fourteenth Amendment.¹⁹² Fulfilling a Madisonian hope thwarted in 1789,¹⁹³ the Stone, Vinson, and Warren Courts aggressively protected fundamental freedoms against hostile state action, while rarely finding that the federal government had violated the rights enumerated in the first ten Amendments.¹⁹⁴ The Burger and Rehnquist Courts were the first tribunals in American history that, with some frequency, ruled that federal laws violated freedom of expression rights enumerated by the Constitution.¹⁹⁵ The Supreme Court has never held that a federal law violates either the Free Exercise or Establishment Clauses of the First Amendment.

¹⁹⁰ 60 U.S. (19 How.) 393, 450 (1856).

¹⁹¹ See, e.g., *Weeks v. United States*, 232 U.S. 383, 389–99 (1914) (invoking the Fourth Amendment to prevent the government from searching citizen's homes without a warrant and using items found in the search against them); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (invoking the Fourth and Fifth Amendments to prevent the government from using a person's private papers against him); see also KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* 29–64 (2004) (exploring the role the Fourth and Fifth Amendments played in protecting privacy).

¹⁹² See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the federal Sixth Amendment right to a trial by jury applies to the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending the federal right to trial counsel guaranteed by the Sixth Amendment to defendants in state courts); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the protections of the Fourth and Fifth Amendments into state law).

¹⁹³ Madison proposed an amendment requiring states to respect certain fundamental freedoms. 1 *ANNALS OF CONG.*, *supra* note 16, at 452. The Senate refused to endorse that proposal. 1 *JOURNAL OF THE SENATE*, *supra* note 144, at 72 (Sept. 7, 1789).

¹⁹⁴ See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 40–41 (2004) (referring to compiled data tending to show that the annual average of federal laws struck down by the three Courts was much lower than the annual average of state laws struck down).

¹⁹⁵ See generally *Reno v. ACLU*, 521 U.S. 844 (1997) (finding that provisions of the Communications Decency Act of 1996 violate the First Amendment); *United States v. Eichman*, 496 U.S. 310 (1990) (holding that a federal law banning the burning of the American flag is unconstitutional); *Buckley v. Valeo*, 424 U.S. 1 (1976) (ruling that the expenditure provisions of the Federal Election Campaign Act of 1971 violate the First Amendment).

B. *The Logic of Enumeration*

The contemporary debate over unenumerated rights is more rooted in the logic of *Marbury v. Madison* than in the constitutional strategies for protecting fundamental freedoms employed by the persons responsible for the original Constitution and the Bill of Rights. The rights specified in the first ten Amendments were originally understood merely as examples of the individual liberties that the Constitution would protect when governing institutions were functioning as the Framers anticipated. Enumerated rights were no more fundamental constitutionally than those rights not enumerated.¹⁹⁶ Several Framers asserted that enumeration facilitated judicial protection for the specified rights,¹⁹⁷ but Justices before 1787 and until the Civil War protected both enumerated and unenumerated liberties.¹⁹⁸ No evidence exists that the proponents of the Bill of Rights sought to alter this ongoing judicial practice.

John Marshall in 1803 proffered a very different conception of the constitutional strategies for limiting government than those adopted by the Framers. *Marbury* asserted that the Constitution limited government power primarily through written legal restrictions on legislative authority that were enforceable by a court of law. Constitutional politics, in this revisionist account, was an oxymoron. Politics was what legitimately took place within constitutional boundaries and not the processes by which those boundaries were determined. Marshall's *Marbury* opinion was the first major American state paper that privileged enumeration as the means for securing fundamental freedoms.

Marbury's emphasis on the "writtenness" of the Constitution and the Constitution as fundamental law began the process by which legal restrictions on federal power enforced by the federal judiciary became understood as the primary constitutional strategy for protecting individual rights and limiting official authority. Constitutions restricted government, Marshall asserted, by enumerating specific restrictions on government power. "The powers of the legislature are

¹⁹⁶ See *supra* notes 27–37 and accompanying text.

¹⁹⁷ See 1 ANNALS OF CONG., *supra* note 16, at 457 (explaining the importance of "independent tribunals of justice" as guardians of the rights enumerated in the Constitution); Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 80–81 (Paul Leicester Ford ed., 1895) (emphasizing the "legal check" that enumeration of rights vests in the judiciary).

¹⁹⁸ See Sherry, *supra* note 49, at 1167–76 (suggesting early court's reliance on natural law principles).

defined, and limited," *Marbury* declared, "and that those limits may not be mistaken, or forgotten, the constitution is written."¹⁹⁹ In this altered constitutional universe, writing and only writing restrained government and prevented tyranny by providing legal grounds for courts to disregard unconstitutional laws. Written constitutional provisions were "the fundamental and paramount law of the nation,"²⁰⁰ and it was "emphatically the province and duty of the judicial department to say what the law is."²⁰¹

The only constitutional limits on national power that this textualist logic recognized were those enumerated in the original Constitution and subsequent amendments. When providing examples of appropriate exercises of judicial power, Marshall emphasized laws inconsistent with such textual provisions as the declaration in Article I, Section 9 that "no bill of attainder or ex post facto law shall be passed."²⁰² At no point did *Marbury* suggest that the Constitution might have been designed to protect fundamental freedoms other than those enumerated or that the Framers may have relied on alternative constitutional strategies for limiting government. Constitutional strategies for protecting fundamental freedoms that abandoned enumeration in favor of institutions structured to provide governing officials with incentives to pursue the general welfare, *Marbury* implied, "abolished" the "distinction . . . between a government with limited and unlimited powers."²⁰³

Marshall's claim that all provisions of the Constitution had independent legal significance further privileged enumeration as the constitutional strategy for protecting fundamental rights. *Marbury* holds that the congressional power to "make exceptions" to the appellate jurisdiction of the Supreme Court does not license the national legislature to add to that tribunal's original jurisdiction. Marshall defended this conclusion by claiming, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."²⁰⁴ The Framers would not have specifically enumerated the conditions under which the Supreme Court could exercise original jurisdiction, he maintained, if the "exceptions" clause of Article III empowered Con-

¹⁹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

²⁰⁰ *Id.* at 177.

²⁰¹ *Id.*

²⁰² *Id.* at 179.

²⁰³ *Id.* at 176.

²⁰⁴ *Id.* at 174.

gress to alter federal jurisdiction at will.²⁰⁵ This presumption, that all constitutional provisions are legally significant, implicitly undercuts previous Federalist assertions that the Bill of Rights was largely declaratory, that the first ten Amendments are best understood as merely enumerating examples of the rights that the original constitution was designed to secure.²⁰⁶ If every constitutional provision has “[legal] effect,” and only some rights are enumerated, then the inference is near overwhelming that government officials are constitutionally obligated to respect only those rights enumerated in the constitutional text. Had the Constitution of 1787 protected all fundamental freedoms, there would have been no reason, by Marshall’s logic, to enumerate only some liberties in 1791.

Marbury’s teachings did not immediately bear fruit. As several commentators have noted, the decision was “born out of political defeat.”²⁰⁷ Judicial power to enforce the Constitution was no greater immediately after 1803 than immediately before. At most, *Marbury* preserved whatever judicial power had previously existed.²⁰⁸ Many antebellum judicial opinions failed to distinguish between enumerated and unenumerated rights.²⁰⁹ The Marshall Court relied on both natural law and the Contracts Clause in *Fletcher v. Peck*.²¹⁰ Federal Justices as late as 1862 insisted that both federal and state officials were obligated to respect the “obligation of contract,” even though the constitutional text explicitly limits only state power. Justice Nathan Clifford in *Rice v. Railroad Co.* asserted, “if the legal effect of the act of Congress” at issue “was to grant to the Territory a beneficial interest in the lands [in dispute], then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title.”²¹¹ No enumerated right was cited as supporting this proposition. Justice Nelson’s dissent similarly disdained text as the primary source for fundamental freedoms. After citing *Fletcher* for the proposition that

²⁰⁵ See *id.* (“If it had been intended to leave it to the discretion of the legislature . . . it certainly would have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.”).

²⁰⁶ See *supra* notes 8–12 and accompanying text.

²⁰⁷ James M. O’Fallon, *Marbury*, 44 STAN. L. REV. 219, 259 (1992).

²⁰⁸ See Mark A. Graber, *Establishing Judicial Review: Marbury and the Judiciary Act of 1789*, 38 TULSA L. REV. 609, 626–27 (2003) (discussing precedent before *Marbury* consistent with the Supreme Court’s power to declare federal and state laws unconstitutional).

²⁰⁹ See Sherry, *supra* note 49, at 1167–76 (discussing antebellum opinions that failed to distinguish between enumerated and unenumerated rights).

²¹⁰ 10 U.S. (6 Cranch) 87, 139 (1810); see *id.* at 143 (Johnson, J., concurring) (relying upon natural law as a legal justification).

²¹¹ 66 U.S. (1 Black) 358, 374 (1861).

"[i]t is well settled in this court that grants [of land], when made by the Legislature of a State cannot be recalled," Nelson asserted, "we do not perceive any reason why the inviolability of the same class of grants should be less when made by the legislative power of the General Government."²¹²

Enumeration became the central constitutional strategy for protecting fundamental rights only after the Civil War. An alliance of powerful lawyers and Republican party officials successfully promoted federal courts as the institution primarily responsible for enforcing constitutional limits on government power.²¹³ Their efforts revived both the *Marbury* precedent²¹⁴ and the textualist logic underlying *Marbury*. In opinions citing *Marbury*, late-nineteenth-century Justices asked, "[o]f what avail are written constitutions whose bills of right for the security of individual liberty have been written, . . . if their limitations and restraints upon power may be overpassed with impunity."²¹⁵ The first Justice Harlan quoted *Marbury* at length when asserting judicial power, declaring, "[t]o what purpose . . . are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"²¹⁶ When Thomas Cooley expressed his "full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government," he was referring to enumerated powers and enumerated rights, and not to a political process thought to provide governing officials with sufficient incentives to pursue the general welfare.²¹⁷ Rights, conservative commentators insisted, were better secured by legal interpretation than by constitutional politics. The "domain of individual liberty," John W. Burgess stated, was "protected by an independent unpolitical department,"²¹⁸

²¹² *Id.* at 382–83 (Nelson, J., dissenting).

²¹³ See generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511 (2002) (demonstrating "that the increased power, jurisdiction, and conservatism of federal courts during this period was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism during a time when that agenda was vulnerable to electoral politics").

²¹⁴ ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 120 (1989) (explaining that *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), cited *Marbury* for the first time for the proposition that courts could "enforce constitutional limitations on legislative bodies").

²¹⁵ *Poindexter v. Greenhow*, 114 U.S. 270, 291 (1884). For the reference to *Marbury*, see *id.* at 298.

²¹⁶ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (quoting *Marbury*).

²¹⁷ THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION*, at iv (Little, Brown, & Co. 1868).

²¹⁸ John W. Burgess, *The Ideal of the American Commonwealth*, 10 POL. SCI. Q. 404, 422 (1895).

and not, as the Framers had thought, by political institutions designed to privilege fundamental freedoms.

During the second half of the twentieth century, a new generation of liberal scholars and judicial activists articulated the same catechism, although frequently on behalf of a different set of rights than those previously championed by conservative proponents of judicial power. Justice Hugo Black, in particular, celebrated judicial protection of enumerated rights as the near exclusive constitutional strategy for protecting fundamental freedoms. "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree," he asserted in *Adamson v. California*, "is to frustrate the great design of a written Constitution."²¹⁹ Black in *Reid v. Covert* declared, "[t]he rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution."²²⁰ The same textualist logic that committed Black to protecting all liberties enumerated by the written Constitution led him to reject vehemently the notion of judicial protection for unenumerated constitutional rights. His dissent in *Griswold v. Connecticut* legitimated judicial power when "courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution," but not when "they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies."²²¹

Two strategies were open for those who rejected Justice Black's constitutional vision. The first, championed by Thomas Grey and Suzanna Sherry, insisted that not all fundamental constitutional freedoms were enumerated. Grey endorsed "the courts' additional role as expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."²²² "The Framers," Sherry agreed, "intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals."²²³ The second, championed by Ronald Dworkin, insisted that what Grey and Sherry regarded as unenumerated rights were, in fact, legitimate interpreta-

²¹⁹ 332 U.S. 47, 89 (1947) (Black, J., dissenting).

²²⁰ 354 U.S. 1, 6-7 (1957).

²²¹ 381 U.S. 479, 525-26 (1965) (Black, J., dissenting) (quoting *Adamson*, 332 U.S. at 90-92 (Black, J., dissenting)).

²²² Grey, *supra* note 2, at 706.

²²³ Sherry, *supra* note 49, at 1127.

tions of such enumerated rights as due process and equal protection. "The Bill of Rights," Dworkin has claimed, "consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right." In his view, "[t]he key issue in applying these abstract principles to particular political controversies is not one of reference but of interpretation, which is very different."²²⁴

Both alternatives disparage the Constitution of 1787. Dworkin's Constitution is the Constitution of 1791, a constitution that protects only enumerated rights, however broadly those enumerated rights are defined. "The right to burn a flag and the right against gender-discrimination" are constitutional rights, Dworkin asserts, only because they "are supported by the best interpretation of a more general or abstract right that is 'mentioned.'"²²⁵ Grey and Sherry's Constitution is the Constitution of 1803, a Constitution whose limits are expounded primarily by the federal judiciary. The first paragraph of Grey's seminal article declares, "the most fundamental question we can ask about our fundamental law" is what "our judges" should do.²²⁶ Sherry concludes that "[t]he founding generation . . . expected the judiciary to keep legislatures from transgressing the natural rights of mankind, whether or not those rights found their way into the written Constitution."²²⁷ Both positions ignore the original commitment to protecting fundamental rights by a series of well-designed government institutions, one of which, but only one of which, is the Supreme Court of the United States.²²⁸

The more institutional guarantees for fundamental freedoms underlying the Constitution of 1787 may nevertheless determine what rights Americans enjoy at the turn of the twenty-first century. Madison understood that the numerous constitutional questions and questions of constitutional law left undecided by the Framers would be resolved by the governing officials who were selected according to the

²²⁴ Dworkin, *supra* note 3, at 387.

²²⁵ *Id.* at 389.

²²⁶ Grey, *supra* note 2, at 703.

²²⁷ Sherry, *supra* note 49, at 1177.

²²⁸ For a rare contemporary meditation by a distinguished constitutional theorist on whether contemporary constitutional institutions are providing governing officials with sufficient incentives to protect fundamental rights, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 95-128 (1999).

rules laid down by Articles I, II, and III.²²⁹ These rules privilege some constitutional visions at the expense of others, although not necessarily the constitutional visions the persons responsible for the Constitution hoped to privilege. The electoral college and state equality in the Senate, for example, help explain why the dominant Republican Party coalition is presently able to champion far more conservative positions than those held by the fictitious median national voter.²³⁰ Howard Gillman correctly points out that the future of enumerated and unenumerated may well depend as much on the predilections of the Republican majority, if that majority is able to regroup after the 2006 national elections, as on what was and was not enumerated in 1787, 1791, and 1868.²³¹ Madison would not be troubled knowing that George Bush and his political allies may not defend those liberties Federalists thought fundamental in 1787. The constitution of 1787 was structured to incorporate progressive understandings of human flourishing. The real question from the perspective of 1787 is whether constitutional institutions can still be trusted to generate a political leadership with the capacity and incentives to pursue the common good and secure basic human rights.

²²⁹ See 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908) (anticipating that “difficulties and differences of opinion” in “expounding terms & phrases necessarily used” in the Constitution).

²³⁰ See generally JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005) (explaining how the Republican Party has promoted more conservative policies than popular majorities favor); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

²³¹ See Gillman, *supra* note 57.